IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2627

In Re: Reilly Tar & Chemical Corporation,

Defendant - Petitioner.

RESPONSE OF THE STATE OF MINNESOTA TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

If this Court schedules an oral argument on Reilly Tar's Petition for Writ of Mandamus, the State of Minnesota will participate in that argument.

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ISSUE PRESENTED FOR REVIEW

Is mandamus appropriate to review a partial summary judgment order dismissing an affirmative defense of prior settlement where

(a) the District Court applied the standards for summary judgment enunciated by the U.S. Court of Appeals for the Eighth Circuit to the substantive issue raised by the affirmative defense;

(b) resolution of the substantive issue raised by the affirmative defense is governed by state contract law and the District Court applied the well-established principles enunciated by the State's highest court; and,

(c) the District Court concluded that interlocutory appeal under 28 U.S.C. §1292(b) was not warranted and therefore denied Petitioner's request for certification of the order for appeal?

Mandamus Cases:

Allied Chemical Corporation et al., v. Daiflon, Inc., 449 U.S. 30 (1980); Will v. U.S., 389 U.S. 90 (1967); Central Microfilm Service Corporation v. Basic/Four Corporation, 688 F.2d 1206 (8th Cir. 1982); Evans Electrical Const. Co. v. McManus, 338 F.2d 952 (8th Cir. 1964).

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STATEMENT OF THE CASE

The litigation out of which Reilly Tar's Petition arises was commenced in the U.S. District Court for the District of Minnesota in September, 1980, when the United States filed a complaint against Reilly Tar and Chemical Corporation ("Reilly Tar") under § 7003 of the Resource Conservation and Recovery ("RCRA"), 42 U.S.C. § 6973. The involvement of the State of Minnesota ("State") in the litigation dates from October, 1980, when the District Court granted the State and the City of St. Louis Park ("City") leave (1) to intervene in the federal claim brought by the United States and (2) to assert as pendent the claims then pending in a state court action. 1/ Claims under §§ 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607, became part of the lawsuit in 1981 when the United States and the State filed amended complaints raising such claims.

Reilly Tar responded to the State's complaint by asserting five affirmative defenses. Its Second Affirmative Defense 2/ was that the State's claims were barred by virtue of an agreement

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1/ The issue decided in the order challenged by Reilly Tar's Petition is whether this state court action was impliedly settled by the State and Reilly Tar. See footnote 9 and the accompanying text at 4-5, infra.

2/ Reilly Tar's Second Affirmative Defense states:

> The complaints giving rise to this action were settled by agreement between the State of Minnesota, the City of St. Louis Park and this defendant by virtue of an Agreement for Purchase of Real Estate executed by the City and this defendant April 14, 1972. The State of Minnesota accepted that settlement at that time and subsequent thereto. Said Agreement is attached hereto as Exhibit A and made a part hereof.

entered into by Reilly Tar and the City to settle the state court lawsuit. In specific, Reilly Tar claimed that the State was impliedly 3/ a party to that agreement, even though the State never signed the agreement 4/, did not see the agreement before it was signed by Reilly Tar and the City 5/, and as a matter of law 6/ and custom could not become a party to that agreement by

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3/ In Response to the Request for Admissions which the State served on Reilly Tar prior to moving for summary judgment, Reilly Tar admits that there is no express or written settlement. Response to Request for Admissions #9 and #10. Its alleged settlement defense is based entirely on its claim that the State is impliedly a party to a settlement agreement negotiated and executed by Reilly Tar and the City. See, e.g., Memorandum of Reilly Tar & Chemical Corporation in Opposition to the State of Minnesota's Motion for Summary Judgment on First [sic] Affirmative Defense at 24.

4/ In response to the Request for Admissions which the State served on Reilly Tar prior to moving for summary judgment, Reilly Tar admitted that the State "is not a signatory to the Purchase Agreement." Response to Requests for Admission #6.

5/ In response to the Request for Admissions which the State served on Reilly Tar prior to moving for summary judgment, Reilly Tar admitted that it never submitted drafts of the agreement to the State for review prior to execution of the agreement with the City and had no information supporting a conclusion that anyone else had submitted such drafts. Response to Request for Admissions #2 and #3.

6/ To become a party to a legally binding settlement dismissing litigation, overt action would have to have been taken by the Minnesota Office of the Attorney General. Minn. Stat. § 8.06 (as it existed at the time of the alleged settlement and still today), provides that absent special authorization from the Governor, the Attorney General, and the Chief Justice, the exclusive authority to conduct the legal business of the State of Minnesota rests with the Attorney General and his assistants. That authority is non-delegable. Muehring v. School District No. 31, 224 Minn. 432, 436, 28 N.W.2d 655, 658 (1974). See also "Minnesota's Statement of Points and Authorities in Opposition to Reilly Tar and Chemical's Motion for Reconsideration or for Certification for Interlocutory Appeal of the Court's Order of August 25, 1983" (Minnesota's Brief in Opposition to Reconsideration or Certification) at 5-6 and 18-20.

the action of another party. 7/

In April, 1983, the State brought a motion for summary judgment on Reilly Tar's Second Affirmative Defense, arguing that there were no material facts at issue which, if proven, would support the defense. The District Court agreed, struck the defense and provided this explanation:

> Giving Reilly Tar the benefit of all reasonable inferences which may be drawn from the record, the court finds no evidence from which one could reasonably infer that the State of Minnesota and Reilly Tar entered into a settlement agreement of the 1970 lawsuit.

Memorandum Order of the District Court, August 25, 1983, ("Memorandum Order") at 12. 8/ This conclusion is what Reilly Tar challenges in its Petition. 9/

7/ As a matter of custom, settlements of litigation involving the Minnesota Pollution Control Agency are always submitted to the Agency Board at its public meetings for formal approval. The minutes of the Agency Board meetings contain no evidence that the Agency Board approved settlement of the litigation. Nor does the record before the Court contain any evidence which refutes or challenges the consistency of the State in submitting proposed settlements for the overt approval of the Agency Board. Memorandum Order at 9.

8/ The District Court's August 25, 1983, Memorandum Order granting summary judgment and its October 27, 1983, Order denying reconsideration and certification have been submitted to this Court by Reilly Tar in Volume 1 of its apppendices, as Documents 2 and 1, respectively. They are not resubmitted by the State.

9/ The only issue resolved in the challenged order is "did a settlement between Reilly Tar and the State exist?" The District Court determined that the answer to this question is no, and consequently struck Reilly Tar's second affirmative defense.

If, as Reilly Tar would have preferred, the District Court answered the question in the affirmative, it would then and

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ARGUMENT

I. TO PROVE ENTITLEMENT TO A SUPERVISORY WRIT OF MANDAMUS, REILLY TAR MUST SHOW THAT THE ACTIONS OF THE DISTRICT COURT WERE SO BLATANTLY WRONG AS TO CONSTITUTE A CLEAR AND INDISPUTABLE USURPATION OF POWER AND THAT, TO ENSURE JUDICIAL FAIRNESS AND ECONOMY, THE ALLEGED USURPATION REQUIRES IMMEDIATE CORRECTION.

It is a well-settled principle of law that a judgment must be final before it may be appealed. 10/ For largely equitable reasons 11/, however, an exception to this general principle is provided and, in certain limited and extraordinary circumstances, the appeal of a non-final judgment may be obtained through the use of mandamus. 12/ To ensure that the exception

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9/ . . . continued from page 4

only then have had to determine whether the settlement acts as a bar to the present action. To make this determination, the court would have had to construe the scope of the settlement.

A significant portion of Reilly Tar's Petition is directed to the question of scope rather than to whether that settlement even exists. Since the challenged orders simply conclude that there is no settlement, arguments regarding scope have no bearing on the challenge. See footnote 43 and accompanying text at 29.

10/ Allied Chemical Corporation et al., v. Daiflon, Inc., 449 U.S. 34, 35 (1980); Kerr v. United States District Court for the Northern District of California et al., 429 U.S. 394, 402-403 (1976); 9 J. Moore, Moore's Federal Practice ¶110.06 (2d ed. 1983).

11/ Although it is classified as a legal remedy, the issuance of mandamus is largely controlled by equitable principles. Duncan Townsite Co. v. Lane, 245 U.S. 308, 311-312 (1917). The equitable nature of mandamus is revealed by a review of the cases in which mandamus has been issued. See infra at 6-7 and 28-30.

12/ Allied Chemical Corporation, supra at 35-36; Kerr, supra at 402-403; Will supra at 95-97; Central Microfilm Service Corporation supra at 1212.

does not devour the rule, courts have been careful to limit the issuance of the writ to truly exceptional circumstances. 13/

The U.S. Supreme Court has explained the showing necessary to demonstrate truly exceptional circumstances:

> The peremptory writ of mandamus has traditionally been used in the federal courts only to 'confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' [Citation omitted.] While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy. [Citation omitted.] . . . And the party seeking mandamus has "the burden of showing that its right to issuance of the writ 'is clear and indisputable.'" [Citations omitted].

Will v. United States, 389 U.S. 90, 95-96 (1967).

Citing its opinion in Will, supra, the U.S. Supreme Court recently reversed the issuance of mandamus by the Court of Appeals for the Tenth Circuit and provided this characterization of its holdings on the issuance of mandamus:

> The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained . . . . In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain: "What never? Well hardly ever!"

Allied Chemical Corporation, supra at 35-36.

13/ Congress has provided an exception to the finality rule thru the appeals process established by 28 U.S.C. § 1292(b). Where, as here, an appeal is sought and denied under that statute, only the most compelling and extraordinary circumstances can justify the issuance of a writ of mandamus. See argument infra at 31-33.

Similarly, in its own statement on the availability of mandamus, this Court has stated:

> Mandamus review generally is available only in extraordinary circumstances . . . [Citation omitted.] Because the right to mandamus must be 'clear and indisputable,' a district court's action generally must be "blatantly wrong" to justify mandamus relief; arguable error within the scope of trial court discretion is not a proper basis for mandamus. [Citations omitted.] Other factors which bear on the appropriateness of mandamus review include the need to correct error which is likely to recur and to provide guidelines for the resolution of novel and important questions. [Citations omitted.] Perhaps the most fundamental concern is the avoidance of piecemeal litigation and disturbance of the orderly administration of the courts - key policies underlying the final judgment rule [citations omitted] . . . .

Central Microfilm Service Corporation v. Basic/Four Corporation, 688 F.2d 1206, 1212 (8th Cir. 1982).

A synthesis of the extensive case law on the subject leads to the following conclusion: To satisfy its burden of proving entitlement to its requested mandamus 14/, Reilly Tar must demonstrate (1) that the District Court's actions were so blatantly wrong as to constitute a usurpation of power and not simply an "arguable error within the scope of the trial court's discretion" and (2) that mandamus review and correction of the orders of the District Court are necessary for obvious equitable reasons. 15/ Reilly Tar has failed to make either of

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14/ Reilly Tar's classification of the writ it requests as "supervisory" does not change its "burden of showing that its right to issuance of the writ is clear and indisputable." La Buy v. Howes Leather Company, 352 U.S. 249, 258 (1957).

15/ For instance, mandamus is appropriate to correct a recurring error, La Buy supra at 258; to provide guidelines for the

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these necessary showings.

II. REILLY TAR HAS FAILED TO DEMONSTRATE THAT THE ORDERS OF THE DISTRICT COURT WERE SO BLATANTLY WRONG AS TO CONSTITUTE A CLEAR AND INDISPUTABLE USURPATION OF POWER.

Reilly Tar's Petition does not challenge the procedures 16/ followed by the District Court in issuing its orders, nor does it claim that the orders of the court were issued under exceptional circumstances. Instead, Reilly Tar seeks mandamus by arguing that the orders wrongly resolve a substantive issue. 17/ This

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15/ . . . continued from page 7

resolution of a new and important issue, Schlagenhauf v. Holder, 379 U.S. 104, 111-112 (1964); or to correct an indisputably inequitable decision. EEOC v. Carter Carburetor, Div. of ACF Industries, 577 F.2d 43 (8th Cir. 1978).

The thread which runs through all these cases is that the mandamus is necessary because the decision of the District Court has consequences beyond the individual case before the court on mandamus appeal or that the decision was so plainly unfair as to require immediate correction.

Reilly Tar's failure to demonstrate a link between its Petition and the equitable considerations expressed in these cases is discussed infra at 28-30.

16/ In an effort to raise a procedural challenge, Reilly Tar claims that the District Court's order was issued as a "discovery sanction," but that the federal rules governing issuance of such sanctions were not followed. This argument is without any factual foundation. See infra at 25-27.

17/ In addition to the the procedural ruse discussed in footnote 16, supra, Reilly Tar makes four arguments in support of its Petition. Reilly Tar Petition at 39-55. All four of these arguments turn on Reilly Tar's continuing efforts to persuade the court that, contrary to the well-settled principles of Minnesota contract law, subjective, secret intentions are relevant to proving the existence of a contract. Even if

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argument is insufficient to demonstrate entitlement to mandamus: it merely consitutes a claim of "arguable error within the scope of the trial court's discretion." As this Court has already ruled, such a claim "is not a proper basis for mandamus." Central Microfilm, supra at 1206.

In the following argument, the State will show that Reilly Tar's Petition does not demonstrate circumstances justifying extraordinary review under mandamus and its appeal should properly await entry of final judgment in the action. The State will demonstrate that Reilly Tar's first four arguments 18/ are variations on a single theme, all outgrowths of Reilly Tar's unique and unfounded theory of contract law. Next, the State will demonstrate that Reilly Tar's fifth (and final) argument is entirely without factual basis. In sum, the State will demonstrate that Reilly Tar's Petition fails establish the exceptional circumstances required for mandamus to lie.

17/ . . . continued from page 8

Reilly Tar were correct, it would still have stated no basis for the issuance of mandamus. Absent facts demonstrating exceptional circumstances, the substance of the District Court's ruling is challengeable on appeal, not by mandamus. See discussion supra at 31-33 and the cases cited therein.

18/ The four arguments raised by Reilly Tar are that (1) the District Court improperly drew inferences against it; (2) the disputed existence of the alleged settlement between Reilly Tar and the State should be resolved by the trier of fact; (3) the District Court misinterpreted Minnesota contract law; and, (4) summary judgment should not have been issued because all the discovery in the underlying litigation was not complete. Each of these arguments is rebutted in the text at 16-20; 20-21; 12-15; and, 21-25, respectively.

A. Although stated separately, the first four arguments in Reilly Tar's Petition constitute a single contention relating to the District Court's interpretation and application of Minnesota contract law. That law was properly applied, and even if it were not, Reilly Tar's contention is insufficient to justify mandamus.

The first four of Reilly Tar's five arguments in favor of mandamus are based on Reilly Tar's effort to reformulate Minnesota contract law. 19/ Some explanation of that law is, therefore, appropriate.

In Minnesota as elsewhere, proof of the existence of an alleged settlement agreement is governed by contract law. Minnesota contract law is plain and unambiguous:

> A compromise settlement of a lawsuit is contractual in nature. To constitute a full and enforceable settlement, there must be such a definite offer and acceptance that it can be said that there has been a meeting of the minds on the essential terms of the agreement.

Jallen v. Agre, 264 Minn. 369, 373, 119 N.W.2d 739, 743 (1963) (footnotes omitted.) As to contracts implied in fact 20/,

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19/ Reilly Tar's continuing attempt to convert Minnesota contract law into doctrine it would prefer has been answered by the State several times. See Minnesota's Brief in Opposition to Reconsideration or Certification at 2-17; State's "Reply Brief in Support of the State of Minnesota's Motion for Summary Judgment on the First [sic] Affirmative Defense of the Reilly Tar & Chemical Corporation" at 3-13.

20/ In its briefs preceding the Petition, Reilly Tar repeatedly characterizes the issue as one only of "implied contracts." It then seeks to use theories of principal-agent relationship and novation to bind the State to the express agreement of other parties. The failure of the undisputed facts to make out a claim under either of these theories has been fully discussed by the State in Minnesota's Brief in Opposition to Reconsideration or Certification 5-7, 19; and by the District Court, Memorandum Opinion at 9, 13-15.

mutual manifestation of assent is to be determined on the basis of objective facts. Bergstedt, Wahlberg, Bergquist Assoc. v. Rothchild, 302 Minn. 476, 479, 225 N.W. 2d 261, 263 (1975). In other words, mutuality of assent is to be determined by the express and not the secret intention of the parties. See also C.J.S. Compromise and Settlement § 7(1) at 182-183. 21/

Reilly Tar's Petition bemoans the reality of contract law in Minnesota in the hopes of transforming it into a doctrine it would prefer. 22/ Reilly Tar ignores the rule that a federal court must follow the law established by the highest court of the State on state law issues. Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); Erie Railroad Company v. Tompkins, 304 U.S. 63 (1938). The Minnesota Supreme Court has determined that proof of the existence of a contract is to be predicated on objective evidence, not on the private musings of a hopeful party. Bergstedt, Wahlberg, supra at 479. With this standard in mind, it is now possible to turn specifically to the first four arguments in Reilly Tar's Petition.

21/ The District Court properly cited and quoted Minnesota contract law in its order. See Memorandum Order at 13 and discussion in the text, infra at 12-15.

22/ In its Petition, as in its preceding briefs, Reilly Tar uses Krueger v. State Department of Highways, 295 Minn. 514, 202 N.W. 2d 873 (1972) and Kabil Development Corp. v. Mignot, 279 Ore. 151, 566 P.2d 505 (1977) in support of its theory that secret intentions may be relevant to proving the existence of a contract. These cases do not stand for the principle proposed by Reilly Tar, but confirm the fact that it is objective indicia of assent which are relevant to proving the formation of a contract. See the State's detailed discussion of these cases in Minnesota's Brief in Opposition to Reconsideration or Certification at 8-16.

1. Reilly Tar falsely presents the District Court's statement of Minnesota contract law.

Reilly Tar's Petition argues that the "District Court misconstrued and misapplied fundamental and controlling principles of the law of contracts." 23/ To prove the misconstruction, Reilly Tar mischaracterizes the District Court's conclusions:

> In its Memorandum Order of August 25, 1983, the lower court concluded that there could not be a contract because there was no express offer and no express acceptance. To so hold is to read out of existence the entire body of law relating to contracts implied in fact. This was a 'clearly erroneous' ruling.

(Emphasis added.) Reilly Tar Petition at 52.

Reilly Tar's argument must be evaluated against the actual language of the court:

> The court finds the record void of facts from which it could be reasonably inferred that a definite offer and acceptance between Reilly Tar and the State occurred which could constitute a meeting of the minds on the essential terms of a settlement agreement.

(Emphasis added.) Memorandum Order of August 25, 1983, at 16. Appendices to Reilly Tar's Petition, Volume 1, Document 2.

This language is not only a proper statement of Minnesota law, it uses the very language of the Minnesota Supreme Court. 24/ Ryan v. Ryan, 292 Minn. 52, 55, 193 N.W.2d 297, 297 (1971), Jallen v. Agre, supra. Reilly Tar's pretended argument (that the District Court ignored the body of law related to implied

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23/ See Reilly Tar's third argument in its Petition at 46-52. Reilly Tar's third argument is the one most obviously about Minnesota contract law and, therefore, is considered first.

24/ The words of the Minnesota Supreme Court are quoted verbatim in the text, supra at 10.

contracts) is based on a false retelling of the District Court's conclusions: The District Court never required an an express offer nor an express acceptance. 25/ It correctly applied Minnesota law requiring (1) that there be a definite offer and acceptance evidencing a meeting of the minds and (2) that proof that the parties had a meeting of the minds be demonstrated by evidence showing the objective manifestation of assent of each person alleged to be a party to the settlement.

Throughout its Petition and lengthy briefs submitted to the District Court, Reilly Tar has been unable to demonstrate any objective evidence of the existence of a contract. Since it is unable to meet the applicable standard, it argues persistently for some other standard. This argument was properly reviewed and rejected by the District Court.

At best, Reilly Tar's dismay at the standard used by the

25/ Reilly Tar's claim that the District Court incorrectly required an "express" offer and acceptance appears to be based on its accusation that the District Court "erroneously focused on the lack of a particular, direct communication between a lawyer for the State and a lawyer for Reilly that explicitly states the settlement." Reilly Tar's Petition at 49.

The Memorandum Order of the District Court belies this accusation. See, e.g., Memorandum Order at 14, wherein the District Court's discusses Reilly Tar's claim that the alleged settlement with the State can be inferred from Reilly Tar's negotiations with the City and concludes that "there is no evidence from which one could reasonably infer that the State in fact assented to settle or dismiss its 1970 suit against the company." Thus, it is plain that the District Court simply applied Minnesota contract law requiring manifestation of assent and, finding not a shred of evidence supporting Reilly Tar's defense, granted summary judgment in favor of the State.

District Court for evaluating its affirmative defense constitutes an argument that the District Court erred in interpreting the law. As explained supra at 7, "arguable error" forms no legitimate basis for the issuance of a writ. Therefore, Reilly Tar's argument is insufficient to justify the exercise of extraordinary power of mandamus. 26/

26/ The explanation in the text of this Response is focused on Reilly Tar's failure to meet the standard for issuance of mandamus, i.e., its failure to clearly and indisputably prove that the District Court was "blatantly wrong" in interpreting and applying Minnesota law regarding contracts implied-in-fact. As is demonstrated in the explanation in this footnote, Reilly Tar's Petition fails to demonstrate that the District Court was wrong at all.

A contract may be implied-in-fact or implied-in-law. A contract implied-in-fact is in all respects a true contract. It requires a meeting of the minds the same as an express contract. Roberge v. Cambridge Cooperative Creamery Co., 248 Minn. 184, 186, 79 N.W.2d 142 (1956); Thus, for both express and implied-in-fact contracts, "it is the objective thing, the manifestation of mutual assent, which is essential to the making of [the] contract." Bergstedt, Wahlberg, Bergquist v. Rothchild, 302 Minn. 476, 479, 225 N.W.2d 261, 263 (1975).

A contract implied-in-fact is distinguished from one implied-in-law, commonly referred to as a quasi-contract. Roberge, supra at 186. Quasi-contracts are not true contracts but are fictions of the law, created on the equitable principles of unjust enrichment, without regard to assent of the parties. 4 Dunnell Minn. Digest 2d Contracts § 2.02 (3d ed. 1977). Thus, for equitable reasons, courts will find the existence of a contract in some instances in which a party is unable to prove the giving of a definite offer and definite acceptance, i.e., when no true contract exists.

Reilly Tar is unable to prove the elements necessary to support the finding of a contract implied-in-fact. Its argument that "there was a meeting of the minds" between the State and Reilly Tar is based entirely on its claim that counsel for the City told counsel for Reilly Tar at the outset of their negotiations that the State (through its counsel) had "indicated it would abide by any settlement

continued on page 15 . . .

Moreover, Reilly Tar's first, second and fourth arguments are costumed repetitions of its third: In all of these four, Reilly Tar challenges the Minnesota standard that subjective intent alone is insufficient to prove the existence of a contract. The following discussion shows that Reilly Tar's other arguments raise no claims different than the one just rebutted.

26/ . . . continued from page 14

which the City and Reilly reached." (Reilly Tar's Petition at 47.) From this claim, it argues that the City was authorized to act as the State's agent in negotiating the alleged settlement. Reilly Tar Petition at 47.

Assuming the State actually said it, the statement that the "State would abide by any settlement which the City and Reilly reached" does not demonstrate the necessary "meeting of the minds," but shows only future intent. This is insufficient to constitute an acceptance to a contract. See, e.g., In Re Estate of Sickmann, 207 Minn. 65, 67; 289 N.W. 832 (1940), wherein the Minnesota Supreme Court noted that: "it is easy for an interested party, in retrospect, to give a mere expression of intention a promissory and contractual effect" and, therefore, warned "that care should be taken not to attach promissory and contractual effect to what was at the time merely an expression of intention concerning future action." Id. See also Hines v. Thomas Jefferson Fire Ins. Co., 267 S.W.2d 709 (Ky. 1954), discussed in the State's "Reply Brief in Support of the State of Minnesota's Motion for Summary Judgment on the First Affirmative Defense of the Reilly Tar & Chemical Corporation" at footnote 12, page 10.

Similarly, Reilly Tar's claim that the City was authorized to act as the State's agent ignores Minnesota statutory law and custom. (See footnotes 6 and 7, supra at 3 and 4.)

As the District Court properly concluded in granting summary judgment the record is "void of facts from which it could be reasonably inferred that a definite offer and acceptance between Reilly and the State occurred which could constitute a meeting of minds on the essential terms of a settlement agreement." Memorandum Opinion at 16.

Given this absence, Reilly Tar, throughout its Petition, seeks to demonstrate the existence of an implied-in-fact contract by arguing theories related to contracts

continued on page 16 . . .

2. The District Court explicitly gave "Reilly Tar the benefit of all reasonable inferences which may be drawn" from the undisputed facts, and found no evidence supporting Reilly Tar's settlement defense.

In its first argument, Reilly Tar complains that the District Court improperly drew inferences against it. Reilly Tar Petition at 39-45. Careful dissection of this argument reveals three challenged inferences: (1) the reasons the State refused to dismiss the litigation 27/; (2) the consistency between Reilly Tar's subsequent conduct and its claim that a settlement

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26/ . . . continued from page 15

implied-in-law. That is, it points to no evidence showing that the State accepted a settlement offer from Reilly Tar, but uses one element for finding a contract implied-in-law (i.e., reliance) to argue that the District Court erred in not finding a contract implied-in-fact.

For instance, Reilly Tar concludes its three page presentation of evidence allegedly demonstrating the existence of a settlement between it and the State by stating that the

> actions and inactions by the State led Reilly to believe that there was a binding settlement agreement between the State and Reilly Tar. The State should not be allowed to assert a contrary meaning.

Reilly Tar Petition at 48.

This argument is logically flawed because it combines elements of non-overlapping theories. Courts do not find the existence of a contract implied-in-fact on the ground that one party has relied: They find it only if an offer and acceptance constituting a clear meeting of the minds are demonstrated. If such offer and acceptance cannot be proven, a court may find the existence of a quasi-contract on the theory of reliance, but only if it also finds that one party has been unjustly enriched by the actions of another. No such unjust enrichment has occurred here, nor has Reilly argued that it has.

27/ Reilly Tar's arguments regarding this inference is set out in its Petition at 40-41. The District Court's discussion of the relevance of this inference is found in Memorandum Order at 15 and quoted infra at 17.

agreement exists 28/; and (3) the reasons the City and Reilly Tar entered into a Hold Harmless Agreement at all. 29/

Nowhere in Reilly Tar's Petition does it explain the relevance of the inferences it challenges. There is a logical explanation for this: none are relevant. Each relates to the subjective intentions of Reilly Tar or of the State, not to the objective manifestation of mutual assent required to prove the formation of a contract.

Indeed, in complaining of the first inference, Reilly Tar does not actually contend that the inference was drawn against it, but rather, that it was not drawn at all. The District Court's own words in this regard are helpful:

> Reilly has asked this court to consider why the State refused to deliver a dismissal of its complaint in 1973 as Reilly and the City apparently contemplated that it would. However, the court does not find inquiry into the rationale of the State for not dismissing the suit relevant. Even if the State intended to dismiss its suit against Reilly in the future when it was satisfied as to what remedial measures were needed and that the City would undertake those measures, the present express intent of the State was not to dismiss the suit.

Memorandum Order at 15. In short, the District Court concluded that the inferences regarding the reasons the State refused to

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28/ Reilly Tar's arguments regarding this inference is set out in its Petition at 43-44. The District Court's actual discussion of this infernece is found in its Memorandum Order at 14. The relevance and import of the inference inference is discussed in the text infra at 17-20.

29/ Reilly Tar's arguments regarding this inference is set out in its Petition at 44-45. The District Court's actual discussion of this inference is found in its Memorandum Order at 15. The relevance and import of the inference inference is discussed in the text infra at 17-20.

dismiss the suit were irrelevant to the issue raised by the summary judgment motion, since those inferences would provide no evidence of the State's manifestation of assent to the alleged agreement.

Similarly, there is no relevance to inferences related to the reasons Reilly Tar and the City entered into a Hold Harmless Agreement. That Hold Harmless Agreement was executed by the City and Reilly Tar more than a year after they signed the Purchase Agreement settling the litigation between them. Memorandum Opinion at 7. The reasons Reilly Tar and the City entered into the Hold Harmless Agreement are not directly relevant to whether there was a contract, but are background facts consistent with the absence of settlement with the State. The District Court did not view the recitals in the Hold Harmless Agreement as anything more, since that agreement was not central to its granting of summary judgment. It granted summary judgment because Reilly Tar failed to demonstrate any of the essential elements of a contract required under Minnesota law.

Finally, inferences regarding the consistency of Reilly Tar's subsequent actions with its claim that a settlement exists also concern no more than background fact. Even if one were to assume that Reilly Tar's actions were consistent with its belief that the State had settled with it, Reilly Tar would still have failed to demonstrate the State's manifestation of assent. Since it is that objective manifestation which is lacking, inferences regarding Reilly Tar's subsequent actions are of no consequence.

Reilly Tar's arguments fail to show that the District Court drew a single material inference against it. In short, the Court found that there are no inferences supporting the existence of a settlement agreement which could reasonably have been drawn from the undisputed facts. 30/

As it has in its Petition, Reilly Tar raised many tangential and irrelevant matters in its submittals to the District Court. The District Court carefully reviewed all of Reilly Tar's submittals before reaching its conclusion as to the absence of a settlement. 31/ Reilly Tar now seeks to twist the District Court's language in patiently addressing these extraneous matters into an argument that the District Court erred in the inferences drawn as to those matters. 32/ The important point is that the

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30/ As quoted supra at 4, the Court specifically stated that it gave "Reilly Tar the benefit of all reasonable inferences which may be drawn from the record" and still could find no evidence from which to infer a settlement. Memorandum Order at 12.

31/ In response to discovery requests submitted to it by the State for evidence of the existence of the settlement, Reilly Tar stated it could not respond since it had not yet completed discovery. This was in April, 1983. When the State brought its motion for summary judgment shortly thereafter, Reilly Tar submitted to the District Court more than one hundred forty exhibits, a lengthy affidavit from counsel for Reilly during the relevant times, and other documentation allegedly supporting the existence of the settlement. Rather than ignore this information, as requested by the State, the District Court chose to review it and comment on it. Reilly Tar now seeks to fault the District Court for drawing inferences from the largely irrelevant evidence it submitted.

32/ Reilly Tar similarly mischaracterizes the language of the District Court in its unsubstantiated allegation that the District Court issued its order as a discovery sanction. See infra at 25-27.

District Court correctly found an absence of material facts on the question of formation of a settlement contract and that it noted nothing inconsistent therewith in the extraneous facts brought up by Reilly Tar. 33/

3. Reilly Tar accuses the District Court of improperly substituting itself for the trier of fact, but fails to demonstrate that there are any disputed facts to be tried.

A similar masquerade underlies Reilly Tar's second claim, wherein it argues that the District Court's order should be reversed because the court "substituted itself for the trier of fact." The District Court could only be accused of improperly substituting itself for the trier of fact when there are facts to be tried. Where there are no material facts in dispute, as in the present case, it is absurd to talk of improper substitution and it is entirely appropriate for the District Court to evaluate the undisputed facts under the law. In the present case, the District Court properly applied the summary judgment procedure of Rule 56, Fed. R. Civ. P., and concluded that there were no material facts in dispute. 34/ Reilly Tar has come forward with

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33/ The only circumstance in which Reilly Tar's challenged inferences could be material to the orders of the District Court is if subjective intent were relevant to demonstrating the existence of a contract. Thus, the success of Reilly Tar's inference argument rises and falls with that of its subjective intent argument. If the former argument fails, then so must the latter. Moreover, since neither argument constitutes more than a complaint of "arguable error," no basis for the issuance of mandamus has been shown.

34/ The District Court specifically applied the standards for summary judgment set down by this Court in Keys v. Lutheran Family and Children's Services of Missouri, 668 F.2d 356, 357-358 (8th Cir. 1982).

no argument to the contrary.

Reilly Tar inappropriately cites Minnesota case law, addressing the role of the reviewing court on an issue the trial court permitted to go to the jury: "the question of whether there is a contract to be implied in fact usually is to be determined by the trier of fact as an inference from the conduct of the parties." Reilly Tar Petition at 46, quoting Roberge v. Cambridge Cooperative Creamery, supra at 146. (Emphasis added.) "Usually," of course, does not mean always.

Reilly Tar's quoting of the Minnesota Supreme Court's decision in Roberge is disingenuous. Reilly Tar cannot simply rest on the conclusory allegation contained in the affirmative defense in its Answer when it brings forward no facts in support of that defense. The District Court properly carried out Rule 56 in piercing the pleadings, looking to the factual record developed through discovery and affidavits, and determining that the standard for granting summary judgment had been met.

4. The District Court had before it all material facts and consequently further discovery is unnecessary.

Reilly Tar begins its fourth argument 35/ by stating that "It is axiomatic that Reilly Tar was entitled to have the Court

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35/ As are its first and second arguments (regarding inferences and triers of fact, respectively) Reilly Tar's fourth argument is predicated on the notion that there are relevant facts to discover. However, Reilly Tar has failed to state which relevant facts remain at issue. It complains baldly that it has been unable to discover facts related to "indirect communications between the State and the City," (Reilly Tar Petition at 53) but provides no insight into why these facts might be relevant to proving the existence of a contract between Reilly Tar and the State.

consider all relevant evidence before a summary decision on Reilly's Second Affirmative Defense." Reilly Tar's Petition at 52. The State agrees with this statement, but finds ironic Reilly Tar's use of the qualifier "relevant:" Summary judgment is appropriate only when there are no material, relevant facts in dispute. Here, there are no disputed facts, and consequently, nothing further to discover. 36/

In granting summary judgment, the District Court properly concluded that if a contract between Reilly Tar and the State had existed, Reilly Tar and the State would each have had in its own possession facts which would prove the existence of a contract. This conclusion followed from two self-evident principles, which necessarily follow from Minnesota's objective test for contract formation: (1) a contract can only be formed by the objective manifestations of mutual assent and (2) if such manifestations were made, then each party would be able to describe the actions taken by the other party which logically constitute that assent. In more aphoristic terms, this test means simply that "it takes two to tango" and that any person claiming to be contracting with another should be able to describe some objective, factual basis

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36/ Reilly Tar's fourth argument, like its previous three, has at its center the implicit assertion that evidence of subjective intent is relevant. It is this "subjective intent" which Reilly Tar seeks to discover and which is irrelevant to demonstrating the existence of a contract.

for the claim. Absent objective facts, there would be no way to distinguish between truth and desire.

Reilly Tar's argument for further discovery of the State is without foundation because mutual assent is essential for any contract and Reilly Tar's interrogatory answers and the other record before the District Court demonstrate that there was no manifestation of mutual assent to a settlement between Reilly Tar and the State. Reilly Tar seeks to turn on its head the customary practice of permitting discovery of the knowledge and understanding of parties to a contract where the contract is ambiguous on its face. Here, there is no evidence of any contract of settlement, let alone an ambiguous contract. In such circumstances, summary judgment is entirely appropriate, even if discovery is incomplete.

A case on point is Wallace v. Brownell Pontiac-GMC Company, Inc. 703 F.2d 525 (11th Cir. 1983). In Wallace, plaintiff filed written interrogatories and a request for production at the same time as its complaint. Before responding to the discovery requests, defendants moved for summary judgment and dismissal. Plaintiff responded by filing motions to compel discovery. The district court granted the motion for summary judgment and treated plaintiff's motion to compel as moot. Plaintiffs contended on appeal that the district court erred in granting summary judgment without allowing them to complete the discovery they alleged to be necessary to ascertain the facts that could be

raised in opposition to the motion. On appeal, the Court of Appeals for the Eleventh Circuit affirmed the order of the District Court and, interpreting the requirements of Rule 56, Fed. R. Civ. P., explained its decision as follows:

> the nonmovant 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts," but rather he must specifically demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.'

Wallace supra at 527. 37/

This case stands for the self-evident proposition that summary judgment is appropriate, even if discovery is incomplete, where no issues of material fact are in dispute. The policy expressed in Rule 56, Fed. R. Civ. P., and in Wallace instructs that no further discovery is needed and summary judgment is appropriate where a party raises a claim of an implied settlement agreement and that party (1) states under oath in its discovery responses that it knows of no evidence of the other party's

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37/ In support of its argument that summary judgment should have been postponed until after it completes discovery, Reilly Tar cites only Parrish v. Board of Commissioners of the Alabama State Bar, 533 F.2d 942 (5th Cir. 1976). The plaintiffs in Wallace also cited Parrish in support of this proposition. The Eleventh Circuit considered this argument and stated: "Parrish, however, does not stand for the blanket principle that [it is error to grant summary judgment before requiring that discovery be completed.]" Wallace at 528. The appropriateness of summary judgment depends on the evidence before the court at the time of the motion and not on the status of discovery. See also Minnesota's Brief in Opposition to Motion for Reconsideration or Certification, footnote 6 at 15-16.

assent to the agreement and (2) subsequently presents to the District Court no relevant evidence demonstrating that assent. 38/ Since contract formation is predicated on mutual manifestation of assent, no settlement agreement can ever be found in these circumstances, no further discovery is called for and summary judgment is appropriate.

B. Reilly Tar's fifth and final argument in support of its Petition is based on a misstatement of the findings and conclusions of the District Court.

As its fifth and final argument, Reilly Tar concocts a procedural challenge in support of its Petition: It claims that the District Court granted summary judgment, in part, as a discovery sanction, and thereby charges the District Court with ignoring the necessary preconditions to imposition of such sanctions.

The State can find no basis for this claim in the Memorandum Order of the District Court. The portion of the District Court's

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38/ At page 54 of its Petition, Reilly Tar discusses the late Mr. Thomas Ryan and attempts to show that it would have been able to provide testimony supportive of its alleged settlement with the State if only Mr. Ryan were alive and able to testify. Reilly Tar's Petition at 54. This suggestion is rebutted by the affidavit of Reilly Tar's local counsel at the time of the Purchase Agreement, Mr. Thomas E. Reiersgord, and by the affidavit given by Mr. Ryan at the time of the 1978 amendment to the state court litigation. (As noted in the text at 2, supra, the issues of this state court litigation are now pendent to the federal claims before the District Court below). The State addressed and rebutted the innuendo that Mr. Ryan had some direct involvement in the alleged settlement in Minnesota's Brief in Opposition to Reconsideration or Certification at 20-23.

order cited by Reilly Tar in support of its argument reads as follows:

> In response to discovery requests by the State for written or non-written evidence or verbal communication to substantiate its affirmative defense that the State accepted the 1972 Purchase Agreement as settlement of its 1972 lawsuit against Reilly Tar, Reilly stated that it was unable to respond as of April 5, 1983, since discovery concerning the matter had not yet been completed.
>
> However, in opposition to the State's motion for summary judgment, Reilly Tar has submitted a lengthy affidavit by Thomas E. Reiersgord, counsel for Reilly Tar during the relevant periods of time, a hundred and forty some exhibits, and depositions of various attorneys involved in this matter. The facts presented by Reilly Tar are not disputed by the State. The parties do dispute the inferences which may reasonably be drawn from this evidence. In addition, the State objects to consideration of this evidence by the court in light of Reilly Tar's failure to respond to discovery requests for any information to support its defense of settlement as late as April of 1983.
>
> The court is of the opinion that it would be justified in striking this affirmative defense based upon Reilly Tar's inability or unwillingness as of April of 1983 to respond with any evidence or factual basis to support its own affirmative defense.
>
> However, the court has considered all the evidence submitted by the parties and finds the following material facts are not in dispute and warrants the granting of summary judgment to the State as to the Second Affirmative Defense of settlement raised by Reilly Tar in its Amended Answer.

Emphasis added. Memorandum Order at 4-5.

Reilly Tar captions its fifth argument in favor of mandamus with the heading: "The District Court stated in its order that summary judgment was appropriate, in part, as a discovery

sanction." 39/ This statement is simply untrue. In truth, the District Court stated that it was of the opinion that Reilly Tar's discovery response could alone serve as an independent grounds for dismissing its settlement defense; however, it looked beyond those responses and evaluated everything proferred by Reilly Tar in support of its own defense.

As to summary judgment, the District Court simply applied the standards of Rule 56 as elaborated by this Court. Memorandum Opinion at 3-4, quoting Keys v. Lutheran Family and Children's Services of Missouri, 668 F.2d 356, 357-358 (8th Cir. 1982). It granted summary judgment for one reason, and for one reason only, the factual records established that the standards for issuing summary judgment were met. There is no foundation for Reilly Tar's claim that summary judgment was issued, even "in part," on any other basis.

39/ Apparently, Reilly Tar infers from the second paragraph at page 5 of Memorandum Order (the third paragraph quoted at 26 supra) that the District Court's order was issued as a discovery sanction. This is simply a wrong reading of the order. The District Court was faced with the fact that, in response to the State's discovery requests regarding the settlement, Reilly Tar stated simply that it could not respond because discovery was not complete and, then, in response to the State's motion for summary judgment, presented lengthy exhibits and evidence allegedly supporting its settlement defense (see quote of the District Court, supra at 26.) Faced with this evidence and the fact that the State cited case law urging the District Court to ignore that evidence, the District Court had to determine whether to consider Reilly Tar's lengthy submittal. The District Court actually decided to consider the evidence -- despite Reilly Tar's failure to include it in its earlier discovery response. Reilly Tar's inference as to the basis of the District Court's holding is unfounded.

III. REILLY TAR HAS NOT DEMONSTRATED THE EXISTENCE OF ANY EQUITABLE GROUNDS FOR THE ISSUANCE OF A WRIT OF MANDAMUS.

Reilly Tar's Petition urges this Court to issue a supervisory writ of mandamus. In so asking, Reilly Tar implies that the District Court's actions require the immediate supervision of the appellate court. Such supervision has been considered necessary only in circumstances in which a general principle of law is at issue 40/ or a great and indisputable inequity has occurred. 41/ Absent these extreme cases or facts justifying appeal under 28 U.S.C. § 1292(b), appeal must await final judgment. 42/

In its Petition, Reilly Tar has asserted no equitable basis for the issuance of the writ. The Petition raises no issue relating to a general principle of law, but merely a contention that the District Court incorrectly applied Minnesota contract law to the facts before it. Thus, no novel or important question

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40/ As described in footnote 15 and its accompanying text supra at 7-8, courts have found the existence of exceptional circumtances justifying mandamaus where appellate supervision is required to correct a recurring error or to provide guidelines for the resolution of a new and important question. In both these cases, judicial economy demands early appellate intervention precisely because the issue raised is related not only to the matter before the District Court, but has far reaching consequences in a number of actions.

41/ See discussion regarding the EEOC case infra at 29-30.

42/ Where, as here, Reilly Tar has attempted to demonstrate facts sufficient to warrant certification of an appeal under 28 U.S.C. § 1292(b) and has failed, it must demonstrate truly extraordinary circumstances to justify mandamus. Evans Electrical Const. Co. v. McManus, 338 F.2d 952, 953 (8th Cir. 1964). See also discussion infra at 31-33.

is at issue and no immediate appellate intervention is required on this ground. 43/

Nor has Reilly Tar shown that it has suffered a great and indisputable inequity. Rather, it simply claims kinship with the circumstances described in EEOC v. Carter Carburetor Div. of

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43/ In the first six pages of its Petition, Reilly Tar repeatedly refers to CERCLA and RCRA. At page 6, for instance, it states:

> It is obvious that the litigation of the health questions raised in the CERCLA case are the same as the health questions which will be relevant on the question whether the State and the City will be allowed to set aside the settlement agreements reached in 1972 and 1973.

Emphasis added. Later on the same page, it claims that discovery on other matters will provide "evidence [which] will help the court decide the meaning, effect, and enforceability of the settlement."

In these and other statements, Reilly Tar assumes the existence of the alleged settlement and thereby ignores the very matter at issue (i.e., whether there was a settlement with the State at all.) Instead, Reilly Tar focuses on the scope of that alleged settlement and argues that the scope may encompass the claims made under CERCLA and RCRA. In thus shifting its focus, Reilly Tar may create the impression that CERCLA and RCRA are in some way relevant to the order of the District Court.

Any such impression is without foundation. The only issue resolved by the District Court was: Did a settlement exist? The question on which Reilly Tar focuses in various arguments and presentations throughout its Petition (i.e., what is the scope of the (alleged) settlement?), of course, was never reached by the District Court since the District Court's finding that there was no settlement rendered moot the question of its alleged scope.

In sum, the issue resolved by the challenged order turns solely on the application of Minnesota contract law to the specific facts in this case. No claims or defenses under CERCLA or RCRA were at issue before the District Court, nor are they in anyway before this Court on mandamus review.

ACF Industries, 577 F.2d 43 (8th Cir. 1978), and, on that basis, urges this Court to issue the requested writ. 44/

The EEOC case in not analagous to the present action. In EEOC, this Court issued a writ of mandamus, reversing an order of the the District Court granting discovery sanctions against the EEOC. That sanctions order was issued by the District Court after it received an ex parte letter from Carter Carburetor, after it had orally heard the arguments of Carter Carburetor on its own motion for discovery sanctions, and before it provided the EEOC with an opportunity to makes its arguments, either orally or in writing. Id. at 49. Moreover, the sanctions were issued by the District Court only against the EEOC even though the discovery abuses of Carter Carburetor were "at least the equal of the tactics of the EEOC." Id.

The decision of this Court to issue mandamus in the EEOC case did not turn on the "prematurity of the order" (as claimed by Reilly Tar) but on the exceedingly suspect due process issues raised by the District Court's issuance of the order without hearing from the EEOC, and on the unfair nature of the order itself. Id. Reilly Tar has not made any convincing argument of procedural irregularity in the present matter and cannot demonstrate that it has suffered any indisputable inequity which would justify the extraordinary writ of mandamus.

44/ In specific, Reilly Tar claims that both the EEOC case and the present action involve "an order which resulted in premature limitation of the issues" (Reilly Tar Petition at 37). As described in the text infra, this is a mischaracterization of the basis for this Court's ruling in the EEOC case.

IV. IN FILING MANDAMUS AFTER THE DISTRICT COURT PROPERLY REFUSED TO CERTIFY ITS ORDER UNDER 28 U.S.C. § 1292(b), REILLY TAR SEEKS TO CONVERT MANDAMUS INTO AN ORDINARY APPEALS PROCESS: MANDAMUS IS NOT A SUBSTITUTE FOR APPEALS

Courts have consistently held that mandamus is not a substitute for appeal. Where, as here, the consequences of the order could be corrected on appeal from final judgment (if the order is found to be in error), mandamus is not appropriate.

This Court has reached that very conclusion in a case factually similar to the one presented. In Evans Electrical Const. Co. v. McManus, 338 F.2d 952, 953 (8th Cir. 1964), as in the present matter, petitioner filed an application for mandamus, seeking to have overturned the District Court's order striking from the petitioner's answer, as defendant in a suit in the District Court, one of its affirmative defenses. This Court dismissed peitioner's application for the writ, explaining as follows:

> One who seeks to have such an interlocutory order overturned cannot choose in a situation of ordinary circumstances to proceed by way of mandamus instead of attempting to proceed by way of § 1292(b). [Citations omitted.] Nor is there a right in a situation of such circumstances to seek mandamus even where an attempt has been made and denied to proceed under § 1292(b). Interlocutory orders whose consequences are able to be corrected by an appeal from final judgment may not at all be made the subject of relief in mandamus except in extraordinary circumstances. [Citation omitted.]

Evans Electrical, supra at 953.

This Court considered the facts in Evans Electrical to be ordinary and concluded that mandamus would not lie. The facts in this case are similarly ordinary. In Evans Electrical, the

District Court struck petitioner's defense as being "insufficient as a matter of law." Here, as in Evans Electrical, the District Court simply applied the law to the undisputed facts. Such a situation involves, at most, arguable error, and is capable of correction on appeal. 45/ Petitioner Reilly Tar, like the petitioner in Evans Electrical, has failed to meet its burden of demonstrating the extraordinary circumstances required for the issuance of a writ.

In essence, Reilly Tar has asked this Court to mandamus a district judge to certify an order under 28 U.S.C. § 1292(b). Faced with such a question, the U.S. Court of Appeals for the Second Circuit remarked on the general policy against piecemeal appeals and concluded that:

> we cannot conceive that we would ever mandamus a district judge to certify an appeal under 28 U.S.C § 1292(b) in plain violation of the Congressional purpose that such appeals should be heard only when both the courts concerned so desire.

D'Ippolito v. Cities Service Company, 374 F.2d 643, 649 (2d Cir. 1967). This case, together with Evans Electrical, recognize the

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45/ Reilly Tar seeks to create the impression that it has no remedy available if mandamus is denied. This is no more true in the present case than in the hundreds of cases in which correction of an error found on appeal requires some proceeding below. In this matter, any proceeding below required after appeal would be limited and would not require rehearing or retrial of matters already decided. Further, providing an immediate appeal would neither accelerate the litigation below nor conserve judicial resources. In these circumstances, there are no grounds for this Court to depart from its well-settled principles disfavoring piecemeal appeals.

clear Congressional preference for finality of judgments before review. Where, as here, an appeal of final judgment is available, mandamus must be denied except in the most extraordinary and exceptional of circumstances.

CONCLUSION

Reilly Tar has failed to demonstrate that the order of the District Court was blatantly wrong or resulted in an indisputable inequity. Nor has Reilly Tar shown that the issues resolved in the challenged order, routine issues of state contract law, are novel or important, nor that the order is in any way extraordinary. In sum, Reilly Tar has failed to make the showing necessary to justify issuance of the writ. For the reasons stated herein, this Court should dismiss Reilly Tar's Petition for Mandamus.

DATED: January 9, 1983

RESPECTFULLY SUBMITTED:

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STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

AFFIDAVIT OF MAILING

Carol T. Groppoli, being first duly sworn on oath, deposes and says that on the 9th day of January, 1984, she served the attached Response of the State of Minnesota to Petition for Writ of Mandamus, by depositing in the United States mail at said City of Roseville, a true and correct copy thereof, properly enveloped, with postage prepaid, and addressed to:

The Honorable Paul A. Magnuson
Judge of the U.S. District Court
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Carol T. Groppoli

Subscribed and sworn to before
me this 9th day of January, 1984.

Notary Public

MARY ANN [illegible]
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Commission Expires Dec. 11, 19[illegible]